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ABSTRACT

The paper examines the issues and process involved in mediation of special education disputes. Mediation is an informal, optional procedure that may save time, money, and emotional strain for both staff and parents. Issues should not be mediated if there is no willingness to accept the mediation decision. Mediation should begin after all efforts at negotiation by staff and legal counsel have failed. Determining who should conduct the mediation is a crucial decision, and in addition to being an uninvolved third party, the mediator should be knowledgeable about legislation and special education and should be able to communicate effectively. The mediator should be prepared (know the facts, issues, the positions of each party, and have alternatives for resolution) and should be fair (assure that the parties know the ground rules and eliminate adversarial conduct). (CL)

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MEDIATION: A PROCESS THAT WORKS

(Some Practical Thoughts For School Systems On Mediation Of Special Education Disputes)

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I. INTRODUCTION

Mediation is an informal but structured process whereby an uninvolved school employee attempts to resolve disagreements between school systems and parents. It is a process which can effectively settle disputes in special education cases. Mediation will, however, not become a useful tool until school systems provide training programs for staff on the techniques of mediation. This paper presents some practical thoughts on mediation for a school system, covering "why" it should mediate, "what" can and cannot be mediated, "when" to mediate, "who" should conduct the mediation, and finally "how" mediation can be conducted. This paper relates general information on mediation. It is neither fully comprehensive of the subject nor is it intended as a substitute for training programs.

II. WHY SCHOOL SYSTEMS SHOULD MEDIATE

Public Law 94-142, the Education for All Handicapped Act (EAHC Act) and its Regulations place extensive and substantial requirements on school systems. These requirements range from finding handicapped students through proper evalu-

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ations to appropriate placements. At almost every stage in these requirements, parents may, and frequently do, disagree with the decision of the school system. If these disagreements are not settled informally, the EAHC Act provides that either the school or parents can invoke the formal procedure of due process appeal to resolve the dispute.

While informal mediation is encouraged by the EAHC Regulations, there is no requirement that the school or parents attempt to resolve differences in this way. Thus, mediation is optional; however, it may not be used to delay or deny formal appeal rights. A comment to the EAHC Regulations states:

> "Many States have pointed to the success of using mediation as an intervening step prior to conducting a formal due process hearing. Although the process of mediation is not required by the statute or these regulations, an agency may wish to suggest mediation in disputes concerning the identification, evaluation, and educational placement of handicapped children, and the provision of a free appropriate public education to those children. Mediations have been conducted by members of State educational agencies or local educational agency personnel who were not previously involved in the particular case. In many cases, mediation leads to resolution of differences between parents and agencies without the development of an adversarial relationship and with minimal emotional stress. However, mediation may not be used to deny or delay a parent's rights [to formal due process.]"

The only alternative to mediation for resolution of a special education dispute is the formal appeal procedure. As the above comment implies, the time and cost, both financial and emo-

tional, of the formal due process proceedings can be substantial. As to time alone, the procedures generally allow for a local hearing, with an appeal right to a state hearing, which can easily consume six months. This is followed by the right to judicial review (through two and sometimes three court levels), frequently taking well over one year for completion. In addition to time, there are substantial staff and legal efforts required to prepare and present the school system's position at each level of appeal. The United States Supreme Court recently said in the Rowley case that courts will review whether school systems have complied with the requirements of the EAHC Act. Thus, at hearings schools must be prepared to defend against claims of failure to comply with the Act's technical requirements. Finally, the fact is, these are "adversarial" hearings and this places an emotional strain on school staff (teachers, psychologists, etc.) who must testify and be cross-examined. Clearly, they would rather be "doing their job" of teaching. Their job description does not include being a "professional witness," they want to be in the "classroom" not the "courtroom." Parents have similar feelings.

Thus, while formal due process hearings must be provided if requested, it is clear that resolution by informal mediation is favorable when appropriate and possible.

III. WHAT DISPUTES CAN BE MEDIATED

Generally any dispute concerning the education of a handicapped student can be a proper subject for mediation. Certainly, any matter that can go to formal due process hearing can be mediated. On that point, the EAHC Regulations pro-

vide that hearings may be invoked when the school system:

> "(1) Proposes to initiate or change the identification, evaluation or educational placement of the child or the provision of a free appropriate public education to the child, or
>
> (2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child."

However, not all issues or disputes are proper subjects for mediation since mediation implies a willingness, although not an obligation, to accept a mediation decision. Thus, mediation is fruitless when the school system concludes that the parents' request is illegal or professionally improper. For example, mediation should not be used if the parents request that their child be identified as specific learning disabled when there is insufficient test data to meet the SLD requirements of the EAHC Act. Simply stated, a school system cannot "mediate away" its obligations to the child as set forth in the EAHC Act. Therefore, school systems must be cautious before agreeing to or recommending mediation.

IV. WHEN MEDIATION SHOULD BE IMPLEMENTED

Mediation can, of course, be implemented any time after a disagreement arises between the parents and school system. However, mediation means putting the issue in the hands of an uninvolved third-person. This should never be resorted to until all face-to-face efforts between the parties have been exhausted. These face-to-face efforts are usually referred to as negotiations. As a general matter, negotiations can be con-

ducted by either school staff or attorneys for the parties.

Negotiations By Staff

Negotiations can, of course, be conducted by the school system staff who are directly involved in the case. Sometimes the issues involved can be isolated, and specific staff can participate in negotiations. For example, if the parents have obtained a private speech evaluation which differs with the school system's recommendations, a face-to-face meeting and discussion between the school and private evaluators may result in a satisfactory compromise. In fact, in all likelihood, the worst that could happen from such a meeting is a clarification of exactly why the disagreement exists. This is a benefit to both parties since the issue which will be presented at the due process hearing will be clearly identified. Sometimes, however, staff negotiations has disadvantages. For example, the parents will frequently have strong feelings directed at those persons with whom they disagree. Thus, objective discussions are difficult. The other problem with staff negotiations is that presumably the parents and staff have already met (e.g., at the IEP meeting) and this meeting ended in disagreement (e.g., the speech pathologist proposed speech once per week rather than the three times requested by the parents). Notwithstanding these problems, staff negotiations can be effective.

Negotiations By Legal Counsel

Negotiations will be successful only if both parties (parents and school systems) feel that they are coming from an equal base. Thus, if parents do not have legal counsel, it

is unwise for the school system to have its attorney involved in the negotiation since this creates, in the parents, an immediate feeling that the school system is trying to "take advantage." When the parents do have legal counsel, however, negotiations will generally have to be with their attorney. Often, the parents' attorney will demand communications be with him or her. In this event, it is wise, if not necessary, for the school system to be represented by an attorney who is experienced in special education law. If a school system decides to negotiate without its own attorney, there are several potential disadvantages. For example, the parents' attorney will frequently negotiate from a legal rather than an educational perspective, using legal jargon and citing case law which can be intimidating, if not overwhelming, for school staff. Further, calling in the school system's attorney after attempted negotiations puts him or her at a distinct disadvantage since opposing counsel will have had the benefit of the knowledge gained by attending the negotiation session. Frequently, when attorneys are involved for both parties, there are advantages to achieving resolution. Attorneys can often provide objectivity and detachment in cases typically fraught with emotion and stress. (It is indeed difficult for parents to remain objective and unemotional when their handicapped child's education and future "are at stake." So it is also for teachers and other school staff who are not accustomed to being challenged on their competency to make correct educational decisions.) Attorneys can provide a buffer to this inherent emotionalism.

Also, attorneys often can be helpful because they can negotiate freely in a confidential manner. (For example, attorneys can agree that their offers and counter-offers for settlement will not be used in due process hearings if negotiations fail.) This allows for a full and candid exchange,

without fear of detriment, which is the best means of achieving resolution. Further, counsel will be able to fully advise their respective clients of the present and future impact or precedent of any negotiated settlement. Therefore, attorneys will be useful, if not necessary, to successful negotiations.

If, however, negotiations fail, it is then time to turn to mediation. The first question is: who should mediate the dispute?

V. WHO SHOULD CONDUCT THE MEDIATION

The fact that mediation becomes necessary means that the face-to-face negotiations have failed and the parents of a handicapped child continue to disagree with a decision by the school system concerning the education of their child. In most cases this is understandably a very strong, personal and emotional concern of the parents. They are "just plain mad" at the school system for not providing their child with what he or she needs. This feeling is often directed at, not only the school system in general, but more specifically the particular staff making the decision (e.g., the child's teacher who says the program is not appropriate; the speech pathologist who feels speech therapy is needed only once per week; the school psychologist who says tests show mental retardation.) With such strong, personally directed feelings, it is sometimes impossible to reach resolution unless an uninvolved person conducts a mediation session.

The person selected as the mediator may be a school system employee. It is not necessary that the mediator be someone outside the school system. Rather, by definition

under the EAHC Act the mediator is expected to be an employee of the local or state school system who has had no prior involvement in the case.

However, the mediator cannot be just anyone. Some obvious fundamental prerequisites include:

- A knowledge of Federal and state laws governing special education.
- A basic understanding of special education services available within the school system.
- An ability to communicate in an effective, non-threatening and non-argumentative manner.
- An ability to control a mediation session under stressful conditions.

Of critical importance is that the mediator have the confidence of both the parents and school staff. Often this can be accomplished by assuring that the parents and staff understand that mediation is not required but optional on their part, and that proposals for resolution will not be binding on the parents or school system. If necessary, it can be agreed that the mediator's proposals for resolution will be held confidential and not be used by either party during due process hearings. Under these circumstances, confidence is achieved because the parties have little, if anything, to lose by mediation.

VI. HOW TO CONDUCT AND PARTICIPATE IN A MEDIATION SESSION

For the person in the role of mediator, the key elements to effective mediation are to be ready and to be fair. These same general elements apply to those school staff who participate in mediation.

Being ready for the mediation session requires that the mediator:

°Know the facts. Mediations can succeed only if the mediator knows all the facts. Otherwise the parents and school staff will feel offended by an obvious lack of interest in the dispute and consider the mediation session an exercise in futility. The result is not only predestined to failure, but will magnify existing conflict, anger and animosity. The mediator must therefore review the student's records in detail.

°Know the issues. Prior to the mediation session, the issues and non-issues must be clearly identified. Mediation sessions can often begin by reviewing those points on which there is agreement. Often this will settle the parties at the outset by reminding both parties that there is agreement on some or most of the elements of the child's education. The parties should agree on the exact and precise issues in advance of the mediation session and submit them to the mediator.

°Know the Parties' Position. Before the mediation session begins, the mediator should have at least a basic understanding of the parties' position on the issues. Often, this will be revealed in the student's file since the parents and school system will often document their views in writing or the minutes of

prior meetings (e.g., IEP meetings) will describe their respective positions.

°Have Alternatives for Resolution. Mediation will be unsuccessful if the mediator is not prepared and authorized to offer some alternatives for resolution within a short time after the session is completed. If this is not done, the parties will view the mediation session as non-productive. The result will be increased anger and animosity.

Being fair during mediation means that the mediator should:

°Assure the Parties Know the Ground Rules. A mediation session will be successful only if both parties know the general agenda and ground rules of the session before it occurs. In this regard, school systems should develop written guidelines for mediation sessions to assure that the informal nature of the mediation session does not fail for lack of minimal structure. Both parties should be open and honest with each other. Therefore, before the session, the mediator should request that both the school and parents reveal the persons who will be present and exchange any documents which will be discussed.

°Eliminate Adversarial Conduct. Both the parents and the school system should be encouraged by the mediator to view the mediation session as a sharing of ideas and not a time to "make

their case." This is no time to overwhelm the parents by bringing in ten staff members. This is no time for parents to "cross-examine" staff to show the school is wrong.

The school staff who will participate in the mediation session generally should follow the foregoing recommendations for the mediator (i.e., know the facts and issues, etc.). However, school staff need to be fully trained to be effective participants in mediation.

VII. CONCLUSION

The practical considerations in this paper are only a few of the numerous approaches which school systems can and should use for successful mediation. However, mediation is a very sensitive process involving strong emotions on both sides. School systems cannot expect to be successful at mediation unless staff members are fully trained in mediation, be it as mediators or participants, and mechanisms are set up for mediation. School systems should establish mediation training programs for persons who will be designated as mediators as well as school staff who participate in mediation sessions, IEP meetings, placement meetings and due process hearings. The costs involved for an effective school mediation training program will be, on the average, far less than the cost of a single, contested special education case that goes through the formal due process appeal procedure. Thus, if the training program avoids only one fully contested case, it will have been cost effective.

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